Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK A. LUMSDEN, CAROLE KAY LUMSDEN
and STEPHENIE LUMDSEN CABANISS,

Petitioners,

vs.

LIBERTY MUTUAL INSURANCE COMPANY
and HELEN HARRIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY

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PARTIES TO THE PROCEEDING

The petition accurately lists Frank A. Lumsden, Carole Kay Lumsden, and Stephenie Lumsden Cabaniss as the petitioners and Liberty Mutual Insurance Company as the respondent. However, Helen Harris should not be listed as a respondent or party to the proceeding because the cause of action appealed by the petitioners was severed from the cause of action pending against Helen Harris. Vol. 1, p. 4-5.

There are no parent companies for the respondent Liberty Mutual Insurance Company. The following are nonwholly owned subsidiaries of respondent Liberty Mutual Insurance Company: Liberty Financial Companies, Inc.

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STATEMENT OF THE CASE

The petition is seeking this Court's review of the Fifth Circuit's opinion approving the district court's granting of summary judgment in favor of respondent and against petitioners. The petition also seeks this Court's review of the Fifth Circuit's opinion approving the district court's granting of respondent's motion to sever and denying all of petitioners' post-judgment motions. This brief in opposition will respond to the petition and set forth the bases for denial of the petition.

As shown below, there is no reason for this Court to grant writ because the petition seeks no more than a review of the factual analysis of the district court and Fifth Circuit on their correct application of Texas state common law to the case at hand. This response will further delineate certain undisputed facts which the petitioners have failed to bring to this Court's attention. Those undisputed facts will bolster the opinions of the district court and Fifth Circuit.

A. The petition fails to state all pertinent undisputed facts which were before the lower courts.

The petition fails to state all the possible heirs with a potential cause of action against the insured of respondent. On page 2 of the petition, the petitioners make reference to the wife and children of the deceased, Frances Lumsden, and imply they are the sole heirs to the estate. However, the petitioners fail to make it clear that Frances Lumsden had an additional heir, her mother, Helen Harris. Under Texas statutory law the petitioners and Helen Harris had potential causes of action against respondent's insured. *See* Tex. Civ. Prac. & Rem. Code § 71.004 (Vernon 1998). Therefore, all the parties with an interest in the estate of Frances Lumsden and who are entitled to seek death and survivorship benefits under Texas law would include the petitioners and Helen Harris.

The petitioners also fail to state that their attorney, Ron Adkison, did not represent Helen Harris. Rather, Helen Harris was represented at all times by J. Paul Nelson. Vol. 2, p. 251. Because Mr. Adkison did not represent Helen Harris, he could not settle any claims or form any contracts on her behalf.

Finally, for clarity, the respondent would state that it disagrees with the following assertions made by the petitioners: (1) "on May 17, 1993, [Respondent] tendered its claimed policy limit of $100,000 [solely] to petitioners . . . "; (2) petitioners "accepted [Respondent's] offer of its policy limits"; (3) respondent "unequivocally acknowledged and confirmed the contract between the parties"; and (4) that payments by respondent to Helen Harris were "a material breach by [respondent] of the written contract between petitioners and [respondent]". Respondent's position on these statements by petitioners will be made clear in the text below.

B. The lower courts applied the correct rule of law in reaching their opinions.

> Under Texas law, "when reviewing written negotiations, the question of whether an offer was accepted and a contract was formed is primarily a question of law for the court to decide."

Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203, 207 (5th Cir. 1998). In this case the questions of law presented to the district court were whether the petitioners had the authority to accept a written offer by the respondent to all the heirs of the estate and whether the petitioners accepted the written offer by the respondent. On the issue of offer and acceptance, Texas follows what is commonly referred to as the mirror image rule.

"The general rule is that 'an acceptance must not change or qualify the terms of the offer. If it does, the offer is rejected.' " *Id.* at 208 (quoting from *United Concrete Pipe Corp. v. Spin-Line Co.*, 430 S.W. 2d 360, 364 (Tex. 1968)); *see also Williford Energy Co. v. Submergible Cable Services, Inc.*, 895 S.W. 2d 379, 384 (Tex. App. — Amarillo 1994, no writ) ("A binding contract must have an offer and an acceptance and the offer must be accepted in strict compliance with its terms."). "Under this 'mirror image' rule, a modification of an offer qualifies as a rejection and counteroffer only if the modification is 'material.' " *Gabor*, 151 F.3d at 208.

> The cases in which courts find modifications to be material under Texas law generally involve significant increases in a party's financial obligation or exposure or in a party's duties under a proposed contract.

Gabor, 151 F.3d at 208. In the case at hand the district court was faced with the determination of whether the attempted acceptance by the petitioners of the respondent's offer amounted to a counteroffer because it contained a material modification. The district court looked at the undisputed facts, applied the correct law as stated above, and determined the attempted acceptance contained a material modification and, therefore; petitioners rejected respondent's offer and made a counteroffer.

C. The offer by the respondent. (Appendix A)

On May 17, 1993, respondent offered to settle the claims of *all the parties* with an interest in the deceased's estate for the policy limits of $100,000. This offer was made in a letter from respondent's agent, Stephanie Lynch, to Ron Adkison, attorney for petitioners. It was respondent's understanding, at that time, that Mr. Adkison represented petitioner Frank

Lumsden "and the survivors and other parties with an interest in the estate of [the deceased]." Vol. 2, p. 251. As was later learned by the respondent, it was mistaken in its belief that Mr. Adkison represented all parties with an interest in the estate of the deceased, because Helen Harris was represented by J. Paul Nelson. Nonetheless, and based upon the mistaken belief that Mr. Adkison represented all parties with an interest in the estate, respondent's May 17, 1993 letter offered to settle for the policy limits and contained the following essential terms:

1. The tender of the policy limits of $100,000;

2. A release of any and all potential claims against the insureds by all parties with an interest in the deceased's estate;[1] and

3. The identity and names of all parties with an interest in the deceased's estate.

Based on this offer and Texas common law, petitioners could only have accepted the offer by unconditionally agreeing to each and every one of the three essential elements in the offer. As will be shown, petitioners did not, and in fact could not, accept this offer.

D. Petitioners' purported acceptance. (Appendix B)

On June 8, 1993, petitioners responded to respondent's offer of May 17, 1993. Vol. 2, p. 253. The response was made

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1. Respondent's intent to obtain a release from all potential parties is clear. This intent is shown in the correspondence between respondent and Ron Adkison; wherein the various documents consistently refer to the need for a release from all parties with an interest in the deceased's estate.

by petitioners' attorney, Ron Adkison. Mr. Adkison's letter was not "unqualified and unconditional, and in the exact terms of the offer." *See National Furniture Manufacturing Co. v. Center Plywood Co.*, 405 S.W. 2d 115, 118 (Tex. App. — Tyler 1966, writ dism'd.). Accordingly, the offer was rejected and the June 8, 1993 letter became a counteroffer.

1. *Petitioners could not comply with an essential element of the offer.*

Mr. Adkison's June 8, 1993 letter failed to address an essential element of respondent's offer. That being the request that respondent be provided "a release of any and all potential claims against the insured by all parties with an interest in [the deceased's] estate." Obviously, the respondent would require that in exchange for payment of the policy limits of $100,000 all its insureds be released from further potential liability. Accordingly, as stated in the offer, it was essential that a release be provided by all parties with an interest in the estate.

One party with an interest in the deceased's estate was Helen Harris. Helen Harris was not represented by Mr. Adkison, but rather was represented by J. Paul Nelson. Because Mr. Adkison was not the attorney or representative for Helen Harris, he had no authority to settle the claim on behalf of Mrs. Harris or agree to a release of all claims by Mrs. Harris. Because Mr. Adkison could not settle the claim on Mrs. Harris' behalf or agree for Mrs. Harris to release all claims, it was impossible for Mr. Adkison, on behalf of *all parties* with an interest in the estate, to have accepted the offer made by respondent. Therefore, the letter of June 8, 1993, from Mr. Adkison could not have been an acceptance by all parties with an interest in the deceased's estate.

2. *Petitioners failed to accept an essential element of the offer.*

Mr. Adkison's letter also failed to accept another essential element of respondent's offer because it did not provide the identity and names of all parties with an interest in the deceased's estate. Had Mr. Adkison provided this information, which would have included the name of Helen Harris and her attorney, respondent would have learned of its mistaken belief that Mr. Adkison represented all parties with an interest. Obviously, this would have resulted in respondent also requiring Helen Harris and her attorney, J. Paul Nelson, to be involved in the settlement negotiations. Again, the petitioners have failed to accept respondent's offer.

Petitioners have attempted to argue that respondent did not care who were the heirs of the deceased. Again, this argument is without merit. The May 17, 1993 letter clearly states that respondent was under the impression that all heirs and parties with an interest in the estate of the deceased were represented by Mr. Adkison. Unbeknownst to respondent, that was simply not the case. That is why the offer by respondent to settle for $100,000 was to Mr. Adkison's "clients." It is clear from the letter that respondent believed that Mr. Adkison's clients included all parties with an interest in the estate. This was important to respondent. If it was of no importance then respondent would not have asked for the names and a release from "all parties with an interest in [the deceased's] estate."

3. *Petitioners made a material modification to the offer.*

Mr. Adkison's letter also added an additional essential element and qualification to the offer. Specifically, it required respondent to provide:

> [A] sworn statement that all applicable policies are as stated in your letter of May 17, 1993.

Vol. 2, p. 253.

Petitioners attempt to argue that the "sworn statement" requirement was no more than a housekeeping request by the petitioners' attorney. Respondent disputes this assertion and argues that it was an essential requirement of the settlement. For example, had respondent provided a sworn statement that the applicable policy limits were not $100,000 but rather $1,000,000, then the petitioners would certainly not be arguing they had accepted only $100,000 to settle the case. Undoubtedly, the petitioners would have immediately increased any settlement demands on the wrongful death claim to exceed the $100,000 amount. As such, the statement that the policy limits be "sworn" to was an essential requirement for the petitioners to settle and a material change to the offer made by respondent.

4. *The June 8, 1993 letter was not an acceptance of the May 17, 1993 offer.*

Accordingly, Mr. Adkison's letter of June 8, 1993, was not an acceptance of the essential terms of the offer, but was instead a counteroffer which had to be accepted by respondent. It was a counteroffer because it failed to accept the essential terms of respondent's May 17, 1993 offer and it further added new material conditions upon which the settlement was to be based. It failed because Mr. Adkison could not settle the claims of Helen Harris or provide a release from Mrs. Harris; it failed to clarify that Mr. Adkison did not represent all parties with an interest in the deceased's estate; and it failed to state the names of all parties with an interest in the estate. Further the June 8, 1993, letter added a new essential term by requiring respondent

to provide a "sworn statement" regarding the insurance. As stated by the district court in its judgment, which was affirmed by the Fifth Circuit, the June 8, 1993 letter rejected the offer, and this new counteroffer was never accepted by respondent.

E. All other correspondence between petitioners and respondent fails to form a contract.

A review of the other correspondence which passed between respondent and petitioners shows the parties were engaged in no more than arms length negotiations and had not reached agreement or a contract as to the settlement of the claim. Vol. 2, pp. 251-281. In fact, the correspondence proves no agreement or contract was made. On September 24, 1993, Mr. Adkison forwarded a letter to J. Paul Nelson, counsel for Helen Harris, with regard to the proposed settlement. In that letter, Mr. Adkison requested Mr. Nelson tell him "the amount of [Helen Harris'] claim so that [Mr. Adkison] can notify the carrier." This statement by Mr. Adkison makes it clear that Mr. Adkison did not believe petitioners and respondent had a contract to settle the petitioners' claim for the entire policy limits of $100,000. If Mr. Adkison had believed the petitioners' claim was settled for the entire policy limits of $100,000, then he would have no reason to request Mr. Nelson provide him with the amount of Helen Harris' claim. Logic dictates that Mr. Adkison only asked for the information because he believed Helen Harris, petitioners, and respondent were still in negotiations as to the final terms of the settlement and had not yet reached a binding contractual agreement. It would be disingenuous for Mr. Adkison or petitioners to now argue otherwise.

Because the new counteroffer was never accepted by respondent and the parties were in arms length negotiations, the district court was correct in granting summary judgment

which disposed of the petitioners' breach of contract claim, and the Fifth Circuit was correct in affirming the district court's decision. The only claim alleged by petitioners against respondent was for breach of contract, and therefore; the summary judgment included all causes of action brought by petitioners against respondent.

F. The Fifth Circuit did not err in affirming the district court's opinion granting respondent's motion to sever.

Federal Rule of Civil Procedure 21 states, *inter alia*, that: "Any claim against a party may be severed and proceeded with separately." This language has been interpreted to mean that a severance creates two separate actions and

> [w]here a single claim is severed out of a suit, it proceeds as a discrete, independent action, and a court may render a final, appealable judgment in either one of the resulting two actions notwithstanding the continued existence of unresolved claims in the other.

Allied Elevator, Inc. v. East Tex. State Bank of Buna, 965 F.2d 34, 36 (5th Cir. 1992). Where summary judgment is granted on all claims alleged against a party, severance of those claims is proper. *See Allied Elevator.*

The only claim alleged by petitioners against respondent was for an alleged breach of a settlement contract. The petitioners had, in an amended complaint, alleged a single claim of fraud against Helen Harris. However, the allegation of fraud was not made against respondent, but only against Helen Harris. By virtue of the granting of summary judgment in favor of respondent, the breach of contract claim was judicially determined. As such, there no longer existed any cause of action

or claim being alleged against respondent in the lawsuit. The only remaining claim was that of fraud against Helen Harris.

Because the petitioners had brought suit against Helen Harris, the summary judgment granted in respondent's favor was interlocutory and not final. Therefore, a severance of the claim brought by petitioners against respondent was necessary to allow the summary judgment to be a final and appealable order.

Also, because the summary judgment was interlocutory in nature, the breach of contract claim alleged by petitioners may not have been barred in a similar state court action brought by the petitioners against the respondent. However, once the summary judgment was severed and made final, then petitioners either had to file their appeals or risk respondent moving the Judge of the Fourth District Court in Rusk County, Texas for a dismissal of the breach of contract claim by petitioners against respondent in *Frank A. Lumsden, Stephanie Lumsden Cabaniss and Carole Kay Lumsden v. Jim Hurst d/b/a Pegues-Hurst Ford a/k/a Pegues-Hurst Motor Company, et al.*, Cause No. 94-365, based on the theories of *res judicata* and/or issue preclusion.

If the claim was not severed and made final, the petitioners may have been allowed to disregard the federal court's order, from which they sought a ruling, and seek the opinion of a state court on the exact same issue. The Fifth Circuit was correct in affirming the severance of the petitioners' claim and thereby not allowing the petitioners an opportunity for a second bite of the apple in state court. The petitioners, not respondent, filed suit in federal court seeking the district court's opinion. It was correct to sever their cause of action and force the petitioners to seek proper redress with the Fifth Circuit Court of Appeals, and ultimately this Court, and not with a state court.

REASONS FOR DENYING THE WRIT

The petitioners argue the Fifth Circuit improperly affirmed the district court's grant of summary judgment in respondent's favor. However, as shown above, the district court and the Fifth Circuit, analyzed the petitioners' breach of contract claim by applying the correct rule of law. That is, the lower courts both viewed the breach of contract claim based on Texas common law and the mirror image rule. That is the correct rule of law in Texas. *See Gabor*. The lower courts applied that rule of law to the undisputed facts in the case. The petitioners are unhappy with the factual analysis made by the lower courts. However, that disappointment does not create the type of case that should be heard by this Court.

The lower courts were correct in granting a severance of the respondent's summary judgment. The severance was appropriate under the Federal Rules of Civil Procedure and the case law interpreting same. It was appropriate because once the breach of contract claim alleged by petitioners against respondent was resolved, there existed no other allegations or causes of action being alleged against the respondent by any other party to the lawsuit. Accordingly, the lower courts exercised their discretion to grant and affirm a severance under the Federal Rules of Civil Procedure and that decision should not be disturbed.

Also, Rule 10 of the Rules of the Supreme Court of the United States, outlines the various types of compelling reasons generally considered by this Court in granting writs. This breach of contract case, based on Texas common law, does not meet any of those reasons. Rule 10 further states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This is that type of case.

As has been shown herein, the petitioners seek writ with this Court to have it revisit the factual analysis of the lower courts based on the lower courts' correct application of Texas common law to the case at hand. The petitioners also seek writ to disturb the decision to grant a severance once all claims against respondent were judicially determined. The facts in this case are not in dispute and are found in correspondence between the respondent and petitioners. Contrary to the assertions of the petitioners, the lower courts correctly analyzed the facts and applied the correct rules of law and rules of procedure. Accordingly, this is not the type of case for which this Court should grant writ.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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